

AN APPRAISAL OF PRE-TRIAL IN OHIO

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INTRODUCTION

In a Report to the Section of Judicial Administration of the American Bar Association, entitled "Use of Pre-Trial in State Courts", dated August 15, 1955, Mr. Will Shafroth, Secretary of the Pre-Trial Committee of the Section, summarized the use of pre-trial in Ohio as follows:

Authorized in some counties under rule of court. In others pre-trial held under inherent power of court. Rather extensively used in larger cities but not by all judges. Used extensively in some counties and only slightly in others. There has been some increase in use since 1952.

While this cryptic summation is true as far as it goes, it certainly is subject to a motion to make definite and certain, and it is my hope that in this article I shall be able to fill in some—though by no means all—of the details and particulars.

Although pre-trial in Ohio has not yet been widely publicized, the State has not been a laggard in the use of the procedure. The absence of references to the practice in Ohio in the growing literature¹ on the subject may be due to the innate modesty of her lawyers and judges or to their unwillingness to exploit their achievements with pre-trial in the bar journals and law reviews of the nation in competition with their brethren of other states.

Be that as it may, in making a search for material to use in writing this article, I found nothing ready-made; and was obliged to impose on the time and good nature of judges and lawyers throughout the state to furnish information on the subject. Although my survey is incomplete, questionnaires, letters, personal conferences and court rules have been the source of considerable reliable data.

As an introduction to the discussion of pre-trial in Ohio, it may be of incidental interest to point out that in another area of procedure—of far greater importance to the administration of justice in metropolitan centers than pre-trial—one Ohio county long ago made notable progress and received wide acclaim throughout the nation. This was in the field of integrating its court and setting up a central plan for the assignment of cases. The Cleveland Plan, adopted by the judges of Cuyahoga County in 1923, at the instigation of the Cleveland Bar Association, was an original contribution to the art of judicial organization and adminis-

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¹ PRE-TRIAL by Mr. Harry D. Nims of the New York Bar, the most comprehensive compilation on pre-trial yet published (1950) contains no description of, and few references to, pre-trial in Ohio; and MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949) by Chief Justice Arthur T. Vanderbilt, mentions pre-trial in Ohio a few times, but for the most part in footnotes.

tration², and was used as a model by the judges of other populous centers to improve their own procedure.³

It is not suggested that the Cleveland System originally included pre-trial as a part of the Plan; but, by unifying the work of the court and providing for the central assignment of cases for trial among the 14 judges, it laid the basis for the effective use of pre-trial in multiple-judge communities; and Cleveland, along with Boston and Los Angeles, was among the first metropolitan districts to adopt pre-trial after its success had been demonstrated about the year 1932 in the Circuit Court of Wayne County, Michigan.

BEGINNINGS OF THE PRE-TRIAL IN OHIO

Some of the principles of pre-trial have long been used in Ohio by individual judges on an informal and occasional basis. In fact, in some counties, the judges for years have had periodical "calls of the docket", when lawyers having cases on call met with the judges to discuss matters preliminary to trial, such as readiness of cases for trial, probable time needed for trial, the fixing of definite trial dates, and the like.

A highly developed form of the "call of the docket" procedure was inaugurated in the Court of Common Pleas of Cuyahoga County in February 1933, when the court adopted a written rule, which, though not denominated as such, was in effect a pre-trial rule, and under it preliminary hearings were held and many settlements were brought about.⁴

As early as the year 1936, the Court of Common Pleas in Cincinnati used some type of "pre-view procedure", and Judge Nelson Schwab of that court was quoted to the effect that the object of these preliminary hearings was to shorten the time of trial by disposing of all matters which might cause delay, and to stimulate "the preparation of cases not

² See *Cleveland Has Best Trial Court in the United States*, 7 J. AM. JUD. Soc'y. 119 (1923); *Amazing Success of Business Principles in Cleveland Common Pleas Court*, by Chief Justice Homer G. Powell, 7 J. AM. JUD. Soc'y. 166 (1924); *Cleveland Courts' Excellent Record*, 14 J. AM. JUD. Soc'y. 52 (1930); 11 NEW YORK STATE BAR ASS'N. BULL. #9; and XVI A.B.A.J. No. 12.

³ The Cleveland Plan, after study by a committee headed by Mr. Harry D. Nims and Judge George Medalie, of New York City, was recommended by them for adoption in the federal court in the Southern District of New York; and representatives of the bench and bar of Wayne County, Michigan, studied and copied the Cleveland Plan several years before they inaugurated pre-trial in their own Circuit Court. In fact, it has been said that the Chief Justice under the Cleveland Plan held hearings involving pre-trial steps which may well have suggested to the Detroit representatives the idea of pre-trial. See *Interest Grows* 14 J. AM. JUD. Soc'y 154 (1931) and *Pre-Trial Comes to Cleveland*, 24 J. AM. JUD. Soc'y. 29, 30, Note 2 (1940).

⁴ The rule is quoted and the procedure described in *Pre-Trial Procedure In Common Pleas Court Revamped*, by William K. Thomas, Judge of the Court of Common Pleas of Cuyahoga County, in the Cuyahoga County Bar Association Bulletin for April, 1954 (Vol. 25, No. 11).

ready for trial wherein depositions in foreign jurisdictions are necessary".⁵

But a pre-trial in Ohio as such under a written rule of court, and as a regular part of the procedure of the court, seems first to have been tried out in Cleveland, beginning about 1939. In that year, it was reported that Chief Justice Powell had decided "to accede to the Cleveland Bar Association's request for complete pre-trial hearings"⁶; and on July 28, 1939, a pre-trial rule was adopted and went into effect the following September.⁷

The rule set up a pre-trial docket and called for the pre-trial of "all civil cases". It directed the appearance of all counsel at the specified time and place, with any exhibits they wished to authenticate or stipulate, and appropriate sanctions were provided if counsel failed to appear. The topics listed for conference included those prescribed in Rule 16 of the Federal Rules, but added "the question of settlement"; and provision was made for recording action taken in a memorandum prepared by the pre-trial judge. Authority was given the pre-trial judge to render judgment on the pleadings upon motion of either party "in the same manner as may now be rendered by the trial court". First reports indicated that the system worked successfully and helped to relieve the congested condition of the docket.⁸

STATUS OF PRE-TRIAL IN METROPOLITAN CENTERS

It is in courts located in counties having large populations that pre-trial is most needed. For there the volume of litigation is greater and dockets become clogged, with the result that cases, after filing, remain dormant for months and even years before they are reached for trial. The evils in such a condition are apparent—parties and witnesses often die or disappear, interest in the cases ebbs, and the parties and the general public come to know the truth of the old adage "Justice delayed is justice denied."

As the fifth State in the Union in population, with more than one-half of her 8,000,000 people concentrated in eight of her eighty-eight counties, it may be presumed that Ohio has had her share of docket problems in her trial courts, and that the need for pre-trial has been as urgent in Ohio as in her sister states.

The following table exhibits the facts with respect to population, county seats and number of judges in eight Ohio counties⁹:

⁵ *Preview Procedure in Cincinnati*, 20 J. AM. JUD. Soc'y. 53 (1936).

⁶ *Pre-Trial Hearings Adopted in Cleveland*, 23 J. AM. JUD. Soc'y. 124 (1939).

⁷ *Pre-Trial Comes to Cleveland*, 24 J. AM. JUD. Soc'y. 29 (1940).

⁸ *Ibid.*

⁹ The population figures are based upon the 1950 census, and are somewhat obsolete; the statistics on judges are taken from the 1955 Ohio Legal Directory, except where more recent information has made a few changes necessary.

COUNTY	COUNTY SEAT	POPULATION OF COUNTY	NUMBER OF COMMON PLEAS	OF JUDGES DOMESTIC RELATIONS AND JUVENILE COURT
Cuyahoga	Cleveland	1,378,205	13	2
Hamilton	Cincinnati	718,785	10	1
Franklin	Columbus	501,882	7	2
Summit	Akron	407,981	5	1
Montgomery	Dayton	396,561	5	2
Lucas	Toledo	395,551	5	1
Stark	Canton	282,060	4	1
Mahoning	Youngstown	256,817	4	1

In most of these eight counties, one or more visiting judges from other counties, assigned by the Chief Justice of the Ohio Supreme Court, are usually sitting to help the regular judges with crowded dockets. In addition to the sixty-four common pleas judges in these eight counties, five more counties have two judges each, and the remaining seventy-five counties have one judge each, making a total of one hundred forty-nine common pleas judges in the State. Then, there are the probate judges, usually one to each county, and in excess of fifty municipal judges who try cases of limited jurisdiction.

Before proceeding to a brief discussion of the status of pre-trial at the present time in each of these populous counties, it should be pointed out that Ohio has no statute or statewide uniform court rule prescribing pre-trial.¹⁰ The practice has been developed in each county using it under local rules of court, elaborated and adopted with the cooperation of the bench and bar, initiative usually having been with the local bar associations. In one instance, however, the Northwestern Ohio Bar Association, comprised of eight counties located in the northwestern part of the State, adopted uniform Court Rules, including a rule for pre-trial procedure, effective in all eight counties.

PRE-TRIAL IN LUCAS COUNTY

Pre-trial in Lucas County (Toledo) will be first discussed because of my greater familiarity with the practice in that county, having observed it in operation since adoption in April, 1950. Prior to that date, pre-trial was not regularly used, and no satisfactory system existed for the assignment of cases among the five trial judges.¹¹ The motion, equity, criminal and civil jury dockets were rotated among the judges, and each tried civil jury cases, when not occupied with the other dockets. Cases were tried as designated by the assignment clerk in their numerical order

¹⁰ The Court of Common Pleas has the power to enact rules defining matters of procedure, so long as they are reasonable, and not in conflict with general laws. *Brown v. Mossop*, 139 Ohio St. 24, 37 N.E. 2d 598 (1951).

¹¹ A sixth judge handled domestic relations and juvenile work; and ordinarily one visiting judge, assigned by the Chief Justice of the Supreme Court, sat to assist with the trial of cases.

on the docket, if ready for trial; and the trial judge usually began the trial of a case without having previously seen the pleadings and papers, and without any special preparation for such trial.

All this was changed by the new Rules adopted on April 10, 1950. These Rules had been fashioned by the Courts Committee of the Toledo Bar Association¹² in cooperation with the judges of the court.¹³ The Rules provided three new weapons for attacking a crowded docket: (1) a division equally among the judges for handling and disposition of all the old civil cases on the docket, and of new cases as filed; (2) pre-trial briefs in all cases where ordered by the judge in charge of a case; and (3) pre-trial conferences in all cases at the discretion of the trial judge.

The provisions in the Rules for pre-trial and pre-trial briefs were, no doubt, prompted in some degree by the example which had been set by United States District Judge Frank L. Kloeb in his court, with which the Lucas County lawyers and judges had become familiar over the years. For shortly after the Federal Rules became effective in 1938, Judge Kloeb began to use pre-trial Rule 16 in civil cases in a manner which not only achieved its objectives, but also met with the approval of the bar generally.¹⁴ All civil cases were regularly pre-tried after the filing of pre-trial briefs by the parties; and all preliminary matters were cleared away, stipulations agreed upon in the interest of simplifying the issues and shortening the trial, and thereafter trials proceeded on the dates assigned at pre-trial with a minimum of lost motion. Settlements were encouraged by the judge at pre-trial and were frequently made as a result of the conference, but there was never undue pressure exerted against a party who did not wish to compromise his case. As a result, at least in part, of this use of pre-trial in the Toledo federal court, the docket though heavy, was at all times kept relatively current, and cases were reached for trial and disposed of much quicker than in the state court.

The New Rules adopted in Lucas County, including the pre-trial rule, were immediately put in operation by the judges, working in harmony with each other and with the bar. The changes effected by the Rules can best be described by a report of the judges themselves made to the Institute of Judicial Administration under date of October 28, 1955:

The new Rules of Practice changed the entire procedure

¹² The Committee, with Mr. Harold A. James of the Toledo Bar as chairman, did an enormous amount of work in gathering information from other jurisdictions and in putting the Rules in shape for approval by the judges.

¹³ Common Pleas Judge John Q. Carey was a member of the Courts Committee and was active in helping with drafting the New Rules; and since their adoption, has been especially interested in pre-trial and instrumental in much of the success it has had in Lucas County.

¹⁴ See *Pre-Trial Conference in Federal Court Practice*, 9 OHIO ST. L.J. 203 (1948), a report of an address made by Judge Kloeb before the Law College Alumni Association of Ohio State University at Columbus on April 17, 1948, in which he discussed in some detail the use of pre-trial in his court.

for the assignment of civil cases for disposition and trial and provided that thereafter all civil cases which were filed would be divided equally and assigned among the five Judges in the numerical order in which they were filed.

After a case was assigned to an individual Judge, he handled all matters in the case, including motions, demurrers, amendments to the pleadings, and conducted the pre-trial conferences, until he finally disposed of the case by settlement or trial.

The pre-trial rule and the practice under it are described in the same report as follows:

As of April 10, 1950, a pre-trial conference system became effective under the new Rules of Practice. (See Rule 15, 'Pre-trial Conferences.'

As you will note, the language of the rule is permissive, but in actual practice pre-trial conferences are scheduled and held in all cases.

The rule governing pre-trial conferences is quite broad in its scope but in actual practice the chief function of the pre-trial conference has been to bring the attorneys together for the purpose of settlement discussion; in some instances to work out stipulations, narrow the issues, determine whether counsel wish to waive a trial by jury, and determine the necessity of trial briefs being filed by counsel.

Before the adoption of the new Rules of Practice on April 10, 1950, jury trials were held constantly. Since the adoption of the new Rules of Practice, jury trials are held for three consecutive weeks and each fourth week is devoted to the disposition of motions, demurrers, et cetera. Two full days of the fourth week are devoted to pre-trial conferences by the Judges.

Pre-trial conferences are assigned at the rate of ten a day, one-half hour apart, so that each Judge conducts a pre-trial conference in at least 20 cases every fourth week.

At the conclusion of the original pre-trial conference, a case may be reassigned for another pre-trial conference for further settlement discussion, or assigned for trial.

Finally, the results under the New Rules are summarized by the judges in the report as follows:

At the time of the adoption of the new Rules of Practice on April 10, 1950, it was estimated that a period of 28 or 29 months elapsed from the date that a civil case was filed until it was reached for trial.

In the past five years since the adoption of the new Rules of Practice, the Judges of the Court of Common Pleas of Lucas County, Ohio, have completely disposed of the approximately 2,500 old cases which were pending at that time.

The current civil dockets have improved to the point where civil cases are reached for a pre-trial conference on an

average of seven to eight months from the date on which they were filed, and on some of the dockets they are running from five to six months from the date of filing.

A unique feature about the Lucas County practice is its regular use in criminal cases. Research has failed to disclose that pre-trial is widely used in criminal cases anywhere in the country, and it may be Lucas County has made, and is making, a real contribution in that field. Although pre-trial in criminal cases is not expressly provided for in the criminal cases are divided equally among the judges exactly as are the Rules, the judges have adapted the practice to the criminal docket; civil cases; and pre-trial conferences are conducted in the criminal cases, with the defendant present with his counsel, just as in civil cases. The hearings are usually held within two weeks after arraignment, and if pleas of guilty are not entered at pre-trial, cases are assigned for trial virtually without delay, unless for good cause additional time is desired by defense counsel.

A major objective of pre-trial as practiced in Lucas County is to bring about settlement of civil cases and pleas of guilty in criminal cases which otherwise would go to trial. Thereby much time is saved and expense avoided and, it is believed, greater justice is accomplished than would probably result if trials had been conducted. Settlements are made as a result of pre-trial which, under the old practice, if made at all, would be accomplished at the eleventh hour "on the courthouse steps", with the disarrangement of schedules and expense which such settlements usually have produced.

One of the factors which, in the opinion of Judge John Q. Carey, has contributed to the success of pre-trial in Lucas County is the fact that the assignment commissioner is a lawyer, and because of his training is able to handle all assignments more efficiently and with the confidence of the bar.

Generally pre-trial, as practiced by the judges of Lucas County, has worked well in the past six years, and has fully justified the expectation of the framers of the New Rules.¹⁵ The practice is still being used effectively and has the approval of the majority of the practicing lawyers in the county.

PRE-TRIAL IN OTHER POPULOUS COUNTIES

Pre-trial in Cuyahoga County, after an auspicious start in 1939, seems to have lost its momentum and to have fallen into such a state of disuse and disfavor that by 1953 it had become a meaningless formality—

¹⁵ The Toledo Municipal Court, with 5 judges, recently has been experimenting with pre-trial. The Toledo Blade of February 2, 1956, carried an article, headed *Pre-Trial Cuts Waiting Time in Suits* in which it quoted Judge Geraldine Macelwane of that court (since appointed a Judge of the Court of Common Pleas) to the effect that pre-trial had reduced the waiting time between filing and trial of suits.

usually a short conference between counsel and judge at the bench—and was badly in need of a transfusion of new interest and leadership. This stimulus was supplied about July, 1953, by Judge William K. Thomas and his colleagues of the court when they published a new rule in the *Daily Legal News* announcing a schedule of pre-trials, and emphasizing that “clients are required to be present in court” at such hearings.

The new rule was mandatory in its terms, and after listing the usual topics for pre-trial, it conferred broad authority upon the pre-trial judge to make necessary decisions and orders within “the spirit and scope of the rule.” Appropriate sanctions for failure of the parties or counsel to appear were provided,¹⁶ and statements of parties and their counsel were not to be binding unless expressly made so by written stipulation at pre-trial. The rule also provided that a memorandum of action taken and stipulations made at pre-trial, prepared by the pre-trial judge, “shall be entered as an order of the court, shall be duly docketed, and shall control the subsequent course of the case***.”

Under the revitalized procedure, 3 of the 15 judges are assigned to pre-trial work. At the hearings, frank and full disclosure is encouraged, the issues are explored, legal points and medical evidence are sometimes discussed, settlements are urged—and this aspect of the hearing sometimes resembles judicial mediation.¹⁷ The practice generally is receiving the cooperation of the judges and the bar.¹⁸

Although one of the earliest references to pre-trial in Ohio is that of the “pre-view procedure” used by the Cincinnati judges, referred to previously in this article, we have found no evidence that pre-trial is extensively used at the present time in Hamilton County, or that much interest is displayed by either the bench or the bar in the subject. This may be due to the fact that the rule in effect for many years provided for pre-trial only when requested by counsel for all of the parties, and to the fact that the docket is said to be in excellent shape, notwithstanding the failure to use pre-trial except in a limited way. However, the rule on pre-trial has recently been changed so that now a conference may be called at the request of counsel for any one of the parties to an action. This may lead to a more frequent use of pre-trial in Hamilton County,

¹⁶ See *Szabo v. Warady*, 44 N. E. 2nd 270 (Ct. of App. Cuyahoga County, 1942), where, in the opinion of the court, one trial judge applied a sanction under an earlier rule a little too drastically.

¹⁷ For a discussion of a similar practice on pre-trial, see *Judicial Mediation: How It Works Through Pre-Trial Conference*, 10 U. CHI. L. REV. 453 (1943) by Judge Harry M. Fisher, assignment and pre-trial conference judge of the Circuit Court of Cook County, Illinois.

¹⁸ Pre-trial as presently conducted in the Cuyahoga County Court is fully described by Judge Thomas in the article to which references have heretofore been made *supra*, note 4.

although many lawyers and some of the judges are still skeptical of the value and need of the procedure.

In Montgomery County, also, pre-trial is not generally used, although a rule on the subject, adopted prior to the year 1950, provides that "conferences of attorneys, or of attorneys and litigants in all classes of actions will be granted when seasonably requested by counsel for a party to the action." However, counsel infrequently make a request for pre-trial and when they do, the conference is sometimes held at the beginning of trials, leaving the jury idly to speculate as to what has caused the delay and as to what is taking place in the court's chambers. At best, the procedure in the Dayton Court is haphazard and sporadic.

The Franklin County Court in June of 1955 adopted a comprehensive rule on the subject of pre-trial, thus bringing to fruition the efforts of the Columbus Bar Association, which for several years had advocated the inauguration of the practice. For the first 5 weeks of the September term, 5 judges conducted pre-trials, and since then one judge has been assigned to the pre-trial docket. Although the procedure is still new and results have not as yet been published, it is felt by members of the bar that pre-trial is working out satisfactorily, and that the disposition of cases has been speeded up and the condition of the docket improved. The usual aftermath of pre-trial—an increase in the number of cases ended by settlement—has been noted in the Columbus Court.

Pre-trial, as a regular procedure, is not presently in use in the Court of Common Pleas of Summit County, and to date, there has been no concerted effort on the part of the Akron bar, nor of the judges of the court, to adopt a rule on the subject. While many individual members of the bar are in favor of pre-trial, and some informal discussions about it have been had, insufficient interest has so far precluded any serious movement looking to the adoption of a pre-trial rule.

In Mahoning County, pre-trial is used on an optional basis in connection with an assignment plan similar to that of Lucas County. The rule now in effect was adopted on July 20, 1954, and provides that any judge may call for pre-trial any civil cases which have been assigned to him, and requires the appearance of "parties and their counsel" unless the judge waives the requirement that parties appear. The rule states that the purpose of pre-trial "is to enlarge justice by consent and to reduce the need for judgment by command." In addition to specifying the usual topics for consideration at pre-trial, the rule contains a provision that "Statements of the parties or their counsel made in the course of the pre-trial hearing shall not be binding upon the parties unless expressly made so by written stipulation at pre-trial."¹⁹ The rule also provides in the

¹⁹ This provision would prevent points being raised as in the case of *Ekins v. Auto Arc-Weld Mfg. Co., Gongwer Service*, March 2, 1956, where it was urged on appeal that admissions against interest made by a party at pre-trial were binding upon him even though the pre-trial hearing partook of the nature of a negotiation for settlement.

event a case is not terminated at pre-trial that upon the request of counsel for either party the case "shall be reassigned for trial to a judge *other* than the pre-trial judge."

Finally, in Stark County, through the joint efforts of a committee of the bar association and the judges of the Common Pleas Court, a pre-trial rule was adopted in March of 1952. The rule, originally mandatory in form, has in practice worked out on an optional basis, with one or more of the judges showing little interest in pre-trial, but with others still attempting to make the rule work. While the rule conforms in general to the rules for pre-trial in other counties, one significant difference deserves emphasis. Rule No. 1 "Settlement of the Case" is followed by this comment: "Although this is listed first it is so done for the reason that if settlement is to be had there is no reason to have a pre-trial conference. Pre-Trial should not be primarily for settlement."

While the majority of the bar of Stark County probably favors pre-trial, the rule apparently is not operating as well as it should because of indifference and the apparent unwillingness of some of the judges to give the rule a fair trial.

STATUS OF PRE-TRIAL IN ONE-JUDGE COUNTIES

In the Court of Common Pleas of Columbiana County, with a population of about 100,000, and but one trial judge, Judge Joel H. Sharp is making pre-trial work under a written rule which provides "The cases shall be assigned for Pre-trial at a definite time at which *the parties and counsel must appear* before the court for a pre-trial conference." Furthermore, if a party is represented by an insurance company which has contracted to prosecute or defend the case, it must appear for pre-trial by counsel or by an officer or adjuster with full discretion to settle the case within the limits of the policy, or be prepared to communicate by telephone with one who is in authority to act on any proposal of settlement recommended by its attorney or adjuster.

The usual topics for consideration at pre-trial are listed in the rule, and statements made by the parties are not binding on them unless incorporated in a written stipulation. Adequate penalties are provided in the rule to insure the appearance of parties and their counsel; in fact, the rule has "teeth" in it, and is mandatory in its terms.

Pre-trial is used by the court in all civil cases except uncontested divorce cases, and experience has demonstrated that 10 cases can be pre-tried in one day. Pre-trials are held in the conference room or jury room, and the majority of the bar cooperates enthusiastically with the program. In addition to simplifying somewhat the issues and shortening to some extent the time of trial, Judge Sharp estimates that 25% of jury cases and 50% judge-tried cases are settled as a result of pre-trial.

Likewise, in Muskingum County, with a population of 75,000, the judge of the Court of Common Pleas, Clarence J. Crossland, regularly

uses pre-trial in nearly all important civil cases. The rule, however, is discretionary with the court, and provides that unless a settlement is agreed upon "no reference to settlement negotiations shall be made in any court order, nor shall such negotiations be referred to directly or indirectly at any subsequent time in such proceeding."

Pre-trials are conducted informally in chambers, and notice of assignment is ordinarily given two or three weeks in advance of the hearings, along with the date of actual trial, so that counsel are more likely to come to pre-trial prepared to discuss the issues and to make ready for trial if settlement is not consummated. In addition to promoting settlements, Judge Crossland has found after 6 or 7 years of experience with pre-trial that time is saved in trial and the court benefits from the practice by becoming acquainted with the legal points, as well as the factual issues, and so can better prepare his charge in advance, instead of waiting to do so after the trial is under way.

Judge Crossland usually does not request the presence of clients at pre-trial, nor does he attempt to exert undue compulsion upon counsel to enter into settlements, believing that the parties and their counsel are better advised as to what they wish to do in that respect. In Muskingum County, the bar has cooperated excellently with the pre-trial procedure, and Judge Crossland is convinced that without it, the business of the court could not be kept up to date, and that will be even more true when it becomes necessary to try a large volume of Industrial cases *de novo*, instead of upon transcript as heretofore.

In northwestern Ohio, eight counties have their own regional bar association and own written Rules of Practice. Among the rules is one on pre-trial, patterned after Federal Rule 16, which was adopted in 1947 and is used on a discretionary basis from time to time by the Common Pleas judges of those counties. Judge Joe M. Moorhead frequently uses the practice—occasionally at the request of counsel—in Hancock County where he is the sole Common Pleas Judge, and has found it helpful in disposing of cases. The procedure is informal, held either in open court or in chambers, has the approval of members of the bar, and in the opinion of Judge Moorhead has a definite place in Hancock County in keeping the docket current and meeting the desire of the public for reducing delay in the administration of justice.

The foregoing are illustrative examples only of the use of pre-trial in the counties having only one trial judge. No doubt, there are many other one-judge or two-judge counties where the practice is used with similar beneficial results. No attempt was made to canvass the bench or bar of all the counties. But the examples given indicate that while the need for pre-trial may not be as great in less populous counties as in the metropolitan districts, yet energetic and conscientious judges have demonstrated that the procedure can be made to work advantageously in the smaller communities as well.

GENERAL COMMENTS ON PRE-TRIAL IN OHIO

The study that has been made of pre-trial in Ohio, and particularly the direct observation that has been made of it in Lucas County and in the United States District Court in Toledo, lead me to venture a few general comments about the procedure and some of the variations of practice that have developed in the use of it.

Should pre-trial be discretionary with the judges or mandatory? In multi-judge counties should the same judge who pre-tries the case conduct the trial on the merits? Should pre-trial be conducted informally in chambers or in open court with a reporter present to transcribe the hearing? Should the parties, as well as counsel, be required to be present? Is the settlement aspect of pre-trial being overemphasized? Strong but honest differences of opinion exist among the lawyers and judges of Ohio with respect to each of these questions, and this conflict of opinion may lend some interest to a brief discussion of each of them.

A discretionary use of pre-trial may be entirely adequate in counties with one or two judges, or in multi-judge counties where there is a will among the judges to give the practice a fair trial. However, too often, if the practice is optional with the judge, or is dependent upon a request of counsel, indifference of both will preclude any resort to pre-trial. It would seem that a mandatory system, in most instances, should lead to a wider use of pre-trial, especially in metropolitan areas. It might to some extent overcome the inertia of both judge and counsel and lead to conferences which might never be had under an optional system.

As to whether the same judge should conduct the trial on the merits after pre-trying it, it is obvious that in the federal courts and in one-judge counties the same judge will ordinarily handle both. Despite the objections that have been made to such procedure, and the refusal to follow it in such large courts as Cuyahoga County and Wayne County, Michigan, the logic, it seems to me, is on the side of the practice followed in Lucas and Mahoning Counties, where each judge, after a case has been assigned to him, controls every action in the case until it is finally disposed of.²⁰ One of the principal benefits of pre-trial is to acquaint the judge with the pleadings and issues in the case—and particularly with the legal points likely to be raised at the trial; and if a different judge is to conduct the trial, much, if not all, of this advantage of pre-trial will be lost, because no pre-trial docket entry or memorandum can properly guide or advise the trial judge, or equal the advantage of direct contact with the case and its issues which the pre-trial judge has had.

²⁰ In England, the courts have followed the practice of having the trial judge conduct pre-trial. See *New Procedure in King's Bench Division*, 16 J. AM. JUD. SOC'Y. 141-143 (1933). It may be that the reason the Cleveland and Detroit courts have not followed the practice lies in different systems for assigning cases. In the article cited *supra*, notes 4 and 18, Judge Thomas gives reasons why the pre-trial judge should not hear the merits.

With respect to the third question, it appears to be the majority view that pre-trial should be informal and held in chambers, without a stenographer present to record the proceedings. It is said that such informality will encourage counsel to speak more frankly concerning the facts and the issues, and will provide an atmosphere in which settlement negotiations can be better initiated and more fully explored. However, such conferences, if not held in open court, should not be so informal as to become mere visits by counsel with the judge. They should be conducted, even in chambers, with some dignity and discipline, or the judge may lose all control, and the conference may degenerate into a meaningless waste of time for everybody. To protect parties and witnesses who make disclosures at pre-trial in the course of informal discussions or settlement negotiations, there should always be a rule that no statement or admission should be binding upon parties, or referred to or used in subsequent proceedings in the case unless incorporated in a written stipulation or in the minutes or order of the pre-trial judge.

Experience seems to have demonstrated that pre-trial will be more effective if the parties are required to be present. It has been previously noted that this feature is the central core of the rejuvenated procedure in Cuyahoga County. Too frequently, if the parties are not present, counsel are not authorized or are unwilling to make binding commitments, and this is especially true with respect to offers and counteroffers of settlement which may be made for the first time at pre-trial. While the court should have the discretion to waive the requirement in instances where the presence of the parties would cause them undue hardship or inconvenience, there can be no doubt that in most instances—especially where settlement is to be an important subject of discussion — progress would be facilitated by the presence of the parties at the hearing; and especially would this be true at subsequent hearings, if the case is assigned for more than one pre-trial conference.

Probably most controversial of all is the practice of using pre-trial as a means of effecting settlements. Many judges and lawyers believe that the principal, if not the only, justification for the use of pre-trial at all is the undoubted fact that it is a means of bringing about settlements of many cases that otherwise might not be compromised.²¹ Lawyers frequently are unwilling to be the first to introduce the subject of settlement with their opposing brethren at the bar. To do so, the classic argument runs, might be considered as an indication of "weakness" or lack of confidence in the strength of their client's case. Besides, in the larger cities adverse

²¹ A strong argument for the view that settlement, through judicial mediation, is the chief objective of pre-trial may be found in 10 U. CHI. L. R. 453 (1943), previously cited, *supra*, note 16; and its author, Judge Harry M. Fisher, of the Circuit Court of Cook County, Illinois, has made an even stronger statement of his settlement philosophy of Tre-Trial, which may be found in NIMS, PRE-TRIAL 22, 68 (1950).

counsel may not even be acquainted with one another, and if they are, may not have occasion to meet or talk with one another after a case has been filed and before it goes to trial. Pre-trial affords a convenient opportunity to remove these obstacles to settlement. The lawyer's natural inhibition against initiating settlement talks is no longer a factor because the judge brings the subject out in the open and invites discussion; and, brought face to face with one another, the lawyers are inclined to banish the coy, cautious approach and to frankly exchange views which often leads to prompt settlements.

On the other hand, parties sometimes do not wish to settle lawsuits and may have good reasons for not doing so; and lawyers frequently have radically different views from the pre-trial judge as to the settlement value of a case and as to the merits of the legal or factual issues, or they may have good reason not to disclose everything they know about the case at the pre-trial stage. In such instances, it is necessary for the pre-trial judge to exercise proper discretion and restraint, if pre-trial is to maintain the cooperation of the bar. To bear down too heavily on settlement with counsel, or with the parties, may seem to be a meddlesome interference—instead of a tactful mediation—and may bring pre-trial into disrepute with practicing lawyers and litigants. In short, pre-trial is not, and can never be, a complete substitute for trial on the merits, which still must be had in a large number of cases.

The Judicial Conference of the United States Courts approved in 1944 a recommendation of its Pre-Trial Committee, of which Judge Alfred P. Murrah of the 10th Circuit Court of Appeals was Chairman, on the subject of settlement as an objective of pre-trial, as follows:²²

The committee considers that settlement is a by-product of good pre-trial procedure, rather than a primary objective to be actively pursued by the judge.

It is my belief, however, that in Ohio the majority of judges and lawyers feel that settlement is not merely a by-product, but one of the most desirable objectives, of pre-trial; and the language of the rules that have been adopted in Ohio on the subject are the best evidence that settlement is a prime purpose and perhaps—in most cases—the motivating consideration leading to the adoption of the rule.

CONCLUSION

No judge or lawyer in Ohio has questioned that pre-trial is sound in theory, and capable of achieving good results if properly used. The complaints and criticisms that have been voiced, all go to the manner of

²² 14 F.R.D. 424; and Chief Judge Ira W. Jayne of the Wayne County, Michigan, Circuit Court—the chief architect of pre-trial—is quoted on the subject in his Credo for the pre-trial judge—NIMS, PRE-TRIAL 96 (1950), as follows: "His principal function is not to procure settlement, but to narrow the issues and facilitate the trial." To the same effect, see *THE CHALLENGE OF LAW REFORM*, 63 (1955) by Chief Justice Arthur T. Vanderbilt.

its use rather than to the procedure itself. But, as we have seen, Ohio in recent years is extending rapidly the use of pre-trial, and already worthwhile accomplishments have been achieved.

But pre-trial is not self-executing; the best rule on the subject will not work in practice unless administered by a judge with common sense, courage and some degree of tact; and with some understanding of the purpose of the procedure and a real interest in promoting its objectives.

For all Ohio lawyers agree that the success or failure of pre-trial rests squarely with the pre-trial judge; and in multi-judge courts, it may depend upon a majority of the judges and whether they have the will and capacity, by harmonious action, to make it work. The cooperation of the bar is important—and a continuing, lively interest on the part of Courts' Committees of the bar associations helps to keep the procedure alive and functioning—but in the last analysis pre-trial depends upon the capacity and will of the judge himself. Indifference, inertia or laissez-faire on the part of the bar or the judge will soon cause pre-trial to lose its effectiveness and to fall into disuse and disrepute. That has already been true in Ohio in some jurisdictions, and will occur again unless the bar is vigilant and the judges are conscious of their public responsibilities in bringing about a better administration of justice in the courts.